IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5937

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SUPREME COURT, U.S.

VENTURA YBARRA, Appellant

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Appellee

ON APPEAL FROM THE ILLINOIS APPELLATE COURT,
SECOND JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Introduction	1
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	3
Can Illinois By Statute Give Police Officers The Authority To Search All Of The Patrons Of A Public Establishment Incident To The Execution Of A Search Warrant For The Premises, Where The Officers Did Not Suspect The Patrons Of Having Committed Any Offense, Of Having Any Connection To The Contraband They Were Seeking, Or Of Posing A Threat To Their Safety?	
Statement of the Case	3
The Question Is Substantial	6
Opinion of the Court	Appendix A
Order denying rehearing	Appendix B
Order of Illinois Supreme Court denying Leave to Appeal	Appendix C
Notice of Appeal to U.S. Supreme Court	Appendix D
Complaint for Search Warrant, introduced into evidence below	Appendix E

CITATIONS

CASES

Bantam Books v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963);

City of Tacoma v. Mundell, 495 P. 2d 682 (Wash. Ct. App., 1972);

Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971);

Commonwealth v. Platou, 312 A. 2d 29 (Pa. Sup. Ct., 1973);

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921);

Interstate Circuit v. Dallas, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968);

McAllister v. State, 306 N.E. 2d 395 (Ind. Ct. App., 1974);

People v. Costales, 354 N.E. 2d 849 (N.Y. Ct. App., 1976);

People v. Dukes, 48 Ill. App. 3d 237, 363 N.E. 2d 62 (Ill. App. Ct., 1977);

People v. Lujan, 484 P. 2d 1238 (Colo. Sup. Ct., 1971);

People v. Smith, 234 N.E. 2d 460 (N.Y. Ct. App., 1967);

Sibiski v. State, 310 A. 2d 200 (Md. Ct. Spec. App., 1973);

Smith v. State, 289 So. 2d 816 (Ala. Sup. Ct., 1974);

Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965);

State v. Bradbury, 243 A. 2d 302 (N.H. Sup. Ct., 1968);

State v. Burns, 306 A. 2d 8 (Me. Sup. Ct., 1973);

State v. Carufel, 263 A. 2d 686 (R.I. Sup. Ct., 1972);

State v. Fox, 168 N.W. 2d 260 (Minn. Sup. Ct., 1969);

State v. Mendez, 565 P. 2d 873 (Ariz. Sup. Ct., 1977);

State v. Nabarro, 525 P. 2d 573 (Hawaii Sup. Ct., 1974);

State v. Sims, 382 A. 2d 638 (N.J. Sup. Ct., 1978);

State v. Smith, 227 S.E. 2d 911 (Ga. Ct. App., 1976);

State v. Wise, 284 A. 2d 292 (Del. Sup. Ct., 1971);

U.S. v. Branch, 545 F. 2d 177 (D.C. Cir., 1976);

United States v. DiRe, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948);

U.S. v. Festa, 192 F. Supp. 160 (D.C. Mass., 1960);

U.S. v. Haywood, 284 F. Supp. 245 (D.C. La, 1968);

Willis v. State, 177 S.E. 2d 487 (Ga. Ct. App., 1970).

LAW REVIEW ARTICLE

W. LaFave, Search and Seizure: The Course of True Law... Has Not...Run Smooth, 1966 Ill. Law Forum 266.

STATUTES

Ill. Rev. Stat., 1975, Ch. 38, Sec. 108-9.

Ga. Code Ann., §27-309;

Ariz. Rev. Stat., §13-1446(E);

Kansas St. Ann., §22-2509;

D.C. Code, 1973, §23-524(g).

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JURISDICTIONAL STATEMENT

Introduction

Ventura Ybarra appeals from the judgment of the Illinois Appellate Court, Second Judicial District, affirming his conviction for possession of heroin and upholding an Illinois statute against the claim that its application to the facts of the case violated the Fourth Amendment of the United States Constitution. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Illinois Appellate Court, Second Judicial District, is reported at 58 Ill.App.3d 57, 373 N.E.2d 1013 (1978). A copy of the opinion is attached hereto as Appendix A. Copies of the orders of the Appellate Court denying rehearing and denying a certificate of importance may be found in Appendix B. A copy of the order of the Illinois Supreme Court denying leave to appeal may be found in Appendix C.

Jurisdiction

The decision of the Illinois Appellate Court in this case, affirming appellant's conviction for possession of heroin, was issued on February 9, 1978. (See Appendix A) Rehearing was sought, but was denied on April 7, 1978. (See Appendix B) The Appellate Court was also asked to certify the importance of this question to the Illinois Supreme Court, but this was denied on April 10, 1978. (See Appendix B) A petition for leave to appeal was filed, but was denied by the Illinois Supreme Court on September 28, 1978. (See Appendix C) Notice of Appeal to the United States Supreme Court was filed on December 1, 1978 in the Illinois Appellate Court for the Second Judicial District. (See Appendix D)

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). Cases sustaining the jurisdiction of this Court to review the judgment herein are: Cohen v. California, 403 U.S. 15, 17-18, 91 S.Ct. 1780, 29 L.Ed.2d 284, 289 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n.3, 83 S.Ct. 631, 9 L.Ed.2d 584, 588 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921); Interstate Circuit v. Dallas, 390 U.S. 676, 678, n.1, 88 S.Ct. 1298, 20 L.Ed.2d 225, 228 (1968).

Statute Involved

Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9:

> Detention and Search of Persons on Premises. In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack,
>
> or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

Question Presented

CAN ILLINOIS BY STATUTE GIVE POLICE OFFICERS THE AUTHORITY TO SEARCH ALL OF THE PATRONS OF A PUBLIC ESTABLISHMENT INCIDENT TO THE EXECUTION OF A SEARCH WARRANT FOR THE PREMISES, WHERE THE OFFICERS DID NOT SUSPECT THE PATRONS OF HAVING COMMITTED ANY OFFENSE, OF HAVING ANY CONNECTION TO THE CONTRABAND THEY WERE SEEKING, OR OF POSING A THREAT TO THEIR SAFETY?

Statement of the Case

Ventura Ybarra was charged by a Kane County, Illinois grand jury with unlawful possession of heroin. (C. 16)* The defense filed a pre-trial motion to suppress the heroin that had been seized from Ybarra during a search of himself and approximately twelve other lawful patrons of a public tavern known as the "Aurora Tap". (C. 22-23). The basis of the motion was that the officers who conducted the search had no probable cause to search Ventura Ybarra, and had no warrant respecting him. (C. 22-23). At the hearing on this motion, Officer Jerome Johnson testified as follows:

On March 1, 1976, while working as an investigator for the Illinois Bureau of Investigation, Johnson participated in the execution of a search warrant at the Aurora Tap. (R. 20-21). Approximately eight other officers took part in the execution of the warrant. (R. 21). The search warrant authorized the search of the Aurora Tap Tavern, and a bartender within it by the name of Greg, for evidence of the offense of possession of a controlled substance. (R. 24).

Agent Johnson stated that nine to thirteen patrons were in the tavern when he arrived there, and that he was not looking for anyone in particular. (R. 25, 61). Johnson had not seen any of the patrons before. (R. 25). On entering the tavern, the agents announced their purpose and advised everyone to

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* "C" designates the common law record on appeal. "R" designates the transcribed report of proceedings.

stay where they were, and that they were going to make a "cursory search for weapons." (R. 31). The lighting was sufficient in the tavern for him to observe the customers. (R. 25). Johnson stated that when the officers entered, Ventura Ybarra was standing by a pinball machine, dressed in a red and black jacket. (R. 26). He noticed nothing protruding from Ybarra's clothing, and there was no indication that he had a weapon or was hostile. (R. 26-27, 77). Ybarra was standing in the general vicinity of all the other patrons. (R. 26).

At this point, Agent Johnson ordered every patron of the Aurora Tap to stand and be searched. (R. 27). He then searched every customer, including Ventura Ybarra. (R. 33). At the time that Ybarra was searched, Agent Johnson had no knowledge or indication that he or any of the other customers had committed any offense. (R. 27) Ventura Ybarra did not make any threatening moves toward anyone, nor any gesture indicative of criminal conduct. (R. 28, 29). Agent Johnson then subjected Ybarra to a "pat down, cursory search for weapons for our protection". (R. 33). Upon questioning by defense counsel, he stated that he found nothing, but on being cross examined by the State's Attorney, he stated he felt a cigarette pack with objects in it. (R. 28, 34). After then searching everyone else in the tavern, he returned and searched Ybarra a second time. (R. 34). Agent Johnson still had no indication that Ybarra had a weapon prior to this second search, and Ybarra's hands, which were empty, were visible to him. (R. 30). Johnson also had no indication prior to this second search that Ybarra had committed an offense, or that he had any contraband on his person. (R. 79-80). Agent Johnson testified that he removed six tin foil packets of heroin from Ybarra's pocket during this second search. (R. 30, 65-6). He also stated that there was one entrance and one exit in the tavern and that the tavern was a fairly large room. (R. 32, 81). During the search, patrons were prevented from entering or leaving. (R. 81).

During argument on this motion, the State relied on Chapter 38, Section 108-9 of the Illinois Revised Statutes, which is set out in the "Statutes Involved" section of this jurisdictional statement. (R. 43). The defense attorney argued that this statute was of dubious constitutionality because of the case of United States v. DiRe, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948).

The court denied the motion to suppress and made the following finding of fact:

> I would make the finding of fact that the search for weapons was conducted and that search was under Section (b) [of Sec. 108-9]: To prevent the disposal or concealment of any instrument, article or things described in the Search Warrant. (R. 52-53).

The cause proceeded to a bench trial and the Court found the defendant guilty of possession of heroin. (R. 96). Ybarra was then sentenced to two years probation. (C. 42, 78, 81, R. 101, 104).

An appeal was taken to the Appellate Court of Illinois, Second Judicial District. The only issue on appeal was whether the search was violative of the Fourth Amendment and whether Section 108-9, if construed so as to permit searches of this type, was unconstitutional. The Court summarized its holding as follows:

> "In summation, we do not find section 108-9 of the Illinois Code of Criminal Procedure to be unconstitutional in its application to the facts before us. We therefore affirm the judgment of the conviction of the defendant herein." (Appendix A, p. 5-6).

The Court also stated that "in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs". (Appendix A, p. 3). However, no such allegation is contained in the complaint for search warrant, which is set out in full in Appendix E.

Following the denial of a petition for rehearing and for certificate of importance by the Appellate Court, appellant

filed a Petition for Leave to Appeal in the Illinois Supreme Court raising the same question decided by the Appellate Court. This petition was denied.

The Question Is Substantial

Introduction

The Illinois Appellate Court held in this case that where police officers had a search warrant for a tavern and a bartender, they could search each patron of that tavern, even though the police did not suspect that any of the patrons were connected to the contraband they were seeking or posed a danger to the officers. This holding was based on the Court's construction of an Illinois statute concerning the execution of search warrants. As construed in this opinion, the statute is in direct conflict with the Fourth Amendment to the United States Constitution. On the authority of this case, Illinois police officers may now engage in searches of persons whom they have no reason to suspect of crime, merely because they patronize a public place for which the police have a search warrant. This question is substantial not only because it jeopardizes the federal constitutional rights of every citizen of Illinois, but also because the statute involved here has counterparts in several other jurisdictions, and constitutional issues concerning such statutes will likely continue to arise.

The Case Is Within The Court's Jurisdiction Under 28 U.S.C. §1257(2).

This case is properly before this Court because the validity of a State statute was drawn into question below "on the ground of its being repugnant to the Constitution ... of the United States, and the decision [was] in favor of its validity". 28 U.S.C. §1257(2). It has repeatedly been held that where a claim is made that a statute is unconstitutional as applied to the facts of a case, and where that claim is rejected by the highest state court in which review could be

had, this Court's jurisdiction under 28 U.S.C. 1257(2) may be invoked. Cohen v. California, 403 U.S. 15, 17-18, 91 S. Ct. 1780, 29 L. Ed. 2d 284, 289 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n.3, 83 S. Ct. 631, 9 L.Ed. 2d 584, 588 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921). This was the claim in this case, and it was rejected by the Illinois Appellate Court. The Appellate Court, by virtue of the Illinois Supreme Court's refusal to exercise its discretionary jurisdiction, was the highest State court in which review could be had. Interstate Circuit v. Dallas, 390 U.S. 676, 678, n.1, 88 S. Ct. 1298, 20 L. Ed. 2d 225, 228 (1968).

The Construction Given Ill. Rev. Stat., 1975, Ch. 38, Sec. 108-9 By The Illinois Appellate Court Transforms Every Illinois Search Warrant Into An Illegal General Warrant, And Authorizes Searches That Violate Fourth Amendment Rights.

Ever since the government conceded, in the widely cited case of United States v. DiRe, that a search warrant for premises could not justify a search of all persons within it, this concept has been accepted virtually without question. United States v. DiRe, 332 U.S. 581, 587, 68 S. Ct. 222, 225, 92 L. Ed. 210, 216 (1948); and see authorities cited in footnote below.* Another rule, equally well accepted,

*U.S v. Branch, 545 F. 2d 177, 181 (D.C. Cir., 1976);
U.S. v. Festa, 192 F. Supp. 160, 163 (D.C. Mass., 1960);
U.S. v. Haywood, 284 F. Supp. 245 (D.C. La., 1968);
City of Tacoma v. Mundell, 495 P. 2d 682, 684 (Wash. Ct. App., 1972);
State v. Burns, 306 A. 2d 8, 10 (Me. Sup. Ct., 1973);
Sibiski v. State, 310 A. 2d 200, 201 (Md. Ct. Spec. App., 1973);
Smith v. State, 289 So. 2d 816 (Ala. Sup. Ct., 1974);
Commonwealth v. Platou, 312 A. 2d 29 (Pa. Sup. Ct., 1973);
Willis v. State, 177 S.E. 2d 487, 490 (Ga. Ct. App., 1970);
State v. Bradbury, 243 A. 2d 302 (N.H. Sup. Ct., 1968);
People v. Smith, 234 N.E. 2d 460 (N.Y. Ct. App., 1967);
People v. Costales, 354 N.E. 2d 849 (N.Y. Ct. App., 1976);
State v. Fox, 168 N.W. 2d 260 (Minn. Sup. Ct., 1969);
State v. Nabarro, 525 P. 2d 573 (Hawaii Sup. Ct., 1974);
State v. Carufel, 263 A. 2d 686, 691 (R.I. Sup. Ct., 1972);
People v. Lujan, 484 P. 2d 1238 (Colo. Sup. Ct., 1971);
State v. Wise, 284 A. 2d 292 (Del. Super. Ct., 1971);
McAllister v. State, 306 N.E. 2d 395, 397 (Ind. Ct. App., 1974);
State v. Sims, 382 A. 2d 638 (N.J. Sup. Ct., 1978).

is that mere presence at the scene of suspected criminal activity, without more, does not give rise to probable cause to search. Sibron v. New York, 392 U.S. 40, 62, 88 S. Ct. 1889, 20 L. Ed. 2d 917, 934 (1968). The conduct of the police in this case violated both of these rules, and the State statute which the Appellate Court construed as permitting this conduct is unconstitutional as applied to these facts.

The contested statute reads as follows:

> Detention And Search Of Persons On Premises.
>
> In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack, or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.
>
> Ill. Rev. Stat., 1975, Ch. 38, Sec. 108-9.

The Appellate Court found that the search of the customers in this case was justified under Section (b) of the above statute. Yet Officer Jerome Johnson, who searched Ventura Ybarra, testified that he had no indication that Ybarra or any of the other patrons had committed any offense. (R.27) At no time in this case, at trial or on appeal, has the State contended that the searching officers suspected the patrons of any criminal activity or of concealing contraband, and Officer Johnson's testimony showed that he entertained no such suspicion. The only possible justification for the search was, therefore, defendant's mere presence in the bar. DiRe and the other cases cited above clearly demonstrate the illegality of such a search.

Officer Johnson's description of the procedure at the bar was that he first conducted a "pat down, cursory search for weapons for our protection". (R.33) According to Johnson, he later returned to search Ybarra a second time, at which time he discovered the heroin. (R.34) The initial

pat down was itself not permissible, for Johnson testified that he had no indication that Ybarra had a gun or was hostile prior to the pat down. (R.26-29, 77) Moreover, once Johnson's pat down disclosed no weapon or contraband, the second search which revealed the heroin was impermissible, for Johnson himself admitted that he had no indication prior to the second search that Ybarra had a weapon or contraband. (R.30, 79-80)

Despite the unequivocal nature of Officer Johnson's testimony, the Appellate Court found that the search of Ybarra was permissible.* The Appellate Court held that the statute permitted the search of those present where a search warrant was being executed, even though the persons searched were not suspected of possessing contraband or of posing a danger to those conducting the search. This construction of the statute brings it into direct conflict with the rule that a search warrant does not confer on the police the right to search all parties present on the premises named in the warrant. Also at odds with this construction is the fundamental Fourth Amendment proposition that a search warrant must particularly describe the objects of the search. Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). This proscription against "general warrants" is violated where a search warrant gives the police the power to search unspecified persons. State v. Sims, 382 A. 2d 638 (N.J. Sup. Ct., 1978); McAllister v. State, 306 N.E. 2d 395, 397 (Ind. Ct. App., 1974); State v. Wise, 284 A. 2d 292 (Del. Super. Ct., 1971); People v. Nabarro, 525 P. 2d 573 (Hawaii Sup. Ct., 1974); Commonwealth v. Platou, 312 A. 2d 29 (Pa. Sup. Ct., 1973). The violation is certainly more severe where the State seeks by statute to automatically include such a power in every search warrant. The State of Illinois, by passing the instant statute, has attempted to turn every warrant into a general warrant, and the Appellate Court's construction of that statute accomplishes just this end.

One noted commentator has questioned the constitutionality of Section 108-9, noting that a narrow reading may have to be given to it for it to be upheld. W. LaFave, Search and Seizure: The Course of True Law...Has Not...Run Smooth, 1966 Ill. Law Forum 266, 272. Professor LaFave suggests that United States v. DiRe, supra will permit a search of a person present when a search warrant is being executed only where some additional connection of that person to the premises exists, beyond the mere status of guest. 1966 Ill. Law Forum, at 272. See also People v. Dukes, 48 Ill. App. 3d 237, 363 N.E. 2d 62 (Ill. App. Ct., 1977). The application of the statute to the present case goes far beyond Professor LaFave's proposed reading.

At least four other jurisdictions, Georgia, Arizona, Kansas, and the District of Columbia, have statutes similar to Section 108-9.* No case in these jurisdictions has upheld searches where, as here, the police specifically testified that they had no suspicions regarding the party searched. (See cases cited in opinion of Appellate Court.) Police conduct far less outrageous than that permitted here has been struck down by the Courts of several of these states as not consonant with a constitutional reading of the statutes. See, e.g., State v. Smith, 227 S.E. 2d 911 (Ga. Ct. App., 1976); State v. Mendez, 565 P. 2d 873 (Ariz. Sup. Ct., 1977). This conflict in interpretation is another reason why this case merits the Court's consideration.

*In addition to overlooking the significance of the testimony of Officer Jerome Johnson that he did not suspect the patrons of concealing contraband, the Court relied on another fact that simply is not true: the Court stated that "in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs". (Appendix A, at p. 3) In fact, no such allegation is contained in the complaint for search warrant, nor is there anything akin to it in the complaint. The complaint for search warrant is set out in full in Appendix E.

*Ga. Code Ann., §27-309; Ariz. Rev. Stat., §13-1446(E); Kansas St. Ann., §22-2509; D.C. Code, 1973, §23-524(g).

As the above reasons demonstrate, the question presented is so substantial as to require plenary consideration for its resolution. In the alternative, appellant requests that this Court summarily reverse the judgment below.

Respectfully submitted,

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EDITOR'S NOTE: APPENDICES A THROUGH E ATTACHED TO THE PETITION HAVE BEEN REPRINTED IN THE SEPARATE APPENDIX VOLUME.